BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BUOM THI NGUYEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 219,438
NATIONAL BEEF PACKING COMPANY, L.P.	)	
Respondent	)	
AND	)	
	)	
WAUSAU INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

Claimant appealed the June 13, 2000 Decision entered by Administrative Law Judge Pamela J. Fuller. The Appeals Board heard oral argument on November 8, 2000.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Decision. Additionally, the record includes the following: (1) the regular hearing transcript from January 22, 1998; (2) Dr. C. Reiff Brown's deposition from January 20, 1998; and (3) Dr. Pedro A. Murati's deposition from January 5, 1998.

ISSUES

This is a review and modification proceeding filed in a workers compensation claim that was initially decided on July 1, 1998, by Special Administrative Law Judge William F. Morrissey. In the initial decision, Judge Morrissey awarded claimant benefits for an eight

percent whole body functional impairment for neck and right shoulder injuries that resulted from a work-related accident that occurred on or about September 17, 1996.[1]

After recovering from her injuries, claimant continued working for respondent until February 2, 1999, when she was terminated for allegedly making threats against a coworker. Claimant then filed this review and modification proceeding alleging that her permanent partial general disability should be increased from the eight percent whole body functional impairment rating to a work disability.

In a June 13, 2000 Decision, which is the subject of this appeal, Judge Fuller ruled on claimant's request to modify the initial award. The Judge denied claimant's request to increase the award, finding that claimant was working in an accommodated job and earning a comparable wage when respondent terminated her. Judge Fuller further stated that she could not find the termination wrongful.

Claimant contends Judge Fuller erred. Claimant argues that respondent failed to meaningfully investigate the alleged threats and, therefore, this claim is controlled by the *Niesz*[2] case, which held the employee was entitled to a work disability (a permanent partial general disability higher than the functional impairment rating) despite being terminated by the employer because of complaints from some of the employer's customers. Claimant contends she has proven, at a minimum, a 61 percent work disability.

Conversely, respondent and its insurance carrier contend the June 13, 2000 Decision should be affirmed. They argue that respondent properly investigated and substantiated the allegations that claimant was threatening a coworker and, therefore, respondent properly terminated claimant's employment. They contend that under these facts, claimant's permanent partial general disability should be limited to the eight percent whole body functional impairment rating as determined by Judge Morrissey in the initial decision.

The only issue before the Board in this appeal is whether claimant's permanent partial general disability should be increased from the functional impairment rating to a work disability.

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[1] The Board notes that Judge Morrissey awarded benefits for a September 7, 1996 accident. But the application for hearing, the parties' stipulations, and claimant's testimony indicate the accident occurred on September 17, 1996.

[2] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. After reviewing the record and considering the parties' arguments, the Appeals Board concludes the June 13, 2000 Decision should be affirmed. The Appeals Board adopts the findings and conclusions set forth in the Decision.

2. Claimant injured her neck and right shoulder working for respondent and was granted an eight percent permanent partial general disability by Judge Morrissey in an award dated July 1, 1998. Claimant continued to work for respondent until February 2, 1999, when she was fired for allegedly threatening a coworker.

3. Before firing claimant, respondent tried to determine whether the accusations were true. From that investigation, respondent concluded that claimant had threatened a coworker as alleged.

4. Claimant's termination was unrelated to her work-related injuries.

5. The Workers Compensation Act provides that a worker's permanent partial general disability rating is limited to the functional impairment rating when that worker returns to work and earns a post-injury wage equaling or exceeding 90 percent of the pre-injury wage. The Act provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.**[3] (Emphasis added.)
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> But the interpretation of that statute continues to evolve.

6. Early on, the Court of Appeals addressed the presumption of no work disability (a permanent partial general disability greater than the functional impairment rating) in both

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[3] K.S.A. 1996 Supp. 44-510e.

Foulk[4] and *Copeland*.[5] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against a work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn rather than actual wages being earned if the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[6]

7. Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[7]

8. The Appeals Board has further interpreted K.S.A. 1996 Supp. 44-510e as requiring workers to make a good faith effort to retain their post-injury employment. The Board has held that workers who are performing accommodated work should advise their employer of any problems working within their medical restrictions and should afford the employer a reasonable opportunity to adjust the accommodations or such failure is evidence of a lack of good faith.

9. On the other hand, employers must also act in good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job offer is not genuine[8] or not within the worker's medical restrictions,[9] or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.[10]

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Copeland*, p. 320.

[7] *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___ (1998).

[8] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[9] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[10] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

10. More recently, the Court of Appeals has held that a worker who declines accommodated work because of transportation problems may be entitled to a work disability where the employer either contributed to those problems or dealt with the worker in bad faith.[11] Additionally, the Court upheld an award for work disability where the worker, who did not display bad faith, was terminated from an accommodated job because of adverse publicity.[12]

11. Placing an injured worker in an accommodated job artificially avoids a work disability by allowing the employee to work for a comparable wage. But once the accommodated job ends, the presumption against a work disability may be rebutted.[13]

12. The Appeals Board concludes that claimant's termination was not done in bad faith. The Board concludes that it is more probably true than not that claimant was threatening a coworker and, therefore, respondent had cause to terminate claimant's employment. The Board concludes that claimant's actions were tantamount to displaying bad faith in retaining accommodated employment.

Therefore, for purposes of determining claimant's permanent partial general disability, the post-injury wage that claimant was earning after she returned to work for respondent following the neck and right shoulder injuries should be imputed for the period commencing with claimant's termination. Because that wage was at least 90 percent of the pre-injury average weekly wage, claimant's permanent partial general disability should be based upon the eight percent whole body functional impairment rating. Therefore, the Appeals Board affirms Judge Fuller's conclusion that the initial award should not be modified.

AWARD

WHEREFORE, the Appeals Board affirms the June 13, 2000 Decision entered by Judge Fuller.

IT IS SO ORDERED.

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[11] *Ford v. Landoll Corporation*, ___ Kan. App. 2d ___, 11 P.3d 59, *rev. denied* ___ Kan. ___ (2000).

[12] *Niesz*, *supra*.

[13] *Niesz*, *supra*.

Dated this ____ day of December 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director